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Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 174.

Office Supreme Court, U. S.
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NICHOLAS V. HALTER AND HARRY V. HAYWARD,
Plaintiffs in Error.
vs.
THE STATE OF NEBRASKA.

In Error to the Supreme Court of the State of Nebraska.

BRIEF FOR PLAINTIFFS IN ERROR.

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Attorney for Plaintiffs in Error.

RABER, PRINTER, OMAHA.

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Statement of Fact.

The plaintiffs in error were arrested, prosecuted and convicted in the District Court of Douglas County, Nebraska, on an information filed against them charging a violation of an Act of the Legislature of the State of Nebraska, approved July 4th, 1903, and entitled "An act to prevent and punish the desecration of the flag of the United States, Compiled Statutes of Nebraska, page 1992, Sections 7975-6-7. (Chap. 139 Laws

of 1903, Cobbey's Annotated Statutes 2375g, et seq.) That Act provides:

> Any person who in any manner, for exhibition or display shall place, or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement of any nature, upon any flag, standard, color, or ensign, of the United States of America, or shall expose or cause to be exposed to public view any such flag, standard, color, or ensign, upon which shall be printed, painted or otherwise placed, or to which shall be attached, appended, affixed, or annexed, any word, figure, mark, picture, design or drawing, or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale, or to give away, or for use for any purpose, any article or substance, being an article of merchandise, or a receptacle of merchandise, upon which shall have been printed, painted attached or otherwise placed, a representation of any such flag, standard, color or ensign, to advertise, call attention to, decorate, mark, or distinguish, the article, or substance on which so placed, or who shall publicly mutilate, deface, defile, or defy, trample upon or cast contempt, either by words, or act, upon any such flag, standard, color or ensign, shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding one hundred dollars, or by imprisonment for not more than thirty days, or both in the discretion of the court.
>
> The words flag, color, ensign, as used in this

act shall include any flag, standard, ensign, or any picture or representation, or either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of said flag, standard, color or ensign, of the United States of America, or a picture, or a representation, of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, color, or ensign, of the United States of America.

This act shall not apply to any act permitted by the statutes of the United States of America, or by the United States Army and Navy regulations, nor shall it be construed to apply to a newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant, or commission of appointment to office, ornimental picture, article of jewelry, or stationary for use in correspondence, on any of which shall be printed, painted or placed, said flag, disconnected from any advertisement.

The information charged that Nicholas V. Halter and Harry V. Hayward, plaintiffs in error, on the 28th of December, 1903, in the County of Douglas, and the State of Nebraska,

Did then and there unlawfully expose to public view, sell, expose for sale, and have in their possession for sale, an article, to-wit: a bottle of beer, being an article of merchandise, upon which said bottle of beer was attached and

placed a label, upon which was printed and painted a representation of the flag of the United States of America to advertise, call attention, to decorate, mark and distinguish the said article, namely, said bottle of beer, on which the said label containing said representation of the flag of the United States of America, was so placed, contrary to the statute, etc. (Printed Record, page 3.)

The plaintiffs in error were each sentenced to pay a fine of $50.00 and costs. (Printed Record, page 10.)

Upon the trial of this case in the State Court, there was no contest as to the facts. It was conceded that the plaintiffs in error, citizens of the United States, were engaged under the laws of Nebraska, in the business of retail liquor dealers; that their only offense consisted in selling and offering for sale, and having in their possession for sale, an article of merchandise, to-wit, malt liquor put up in bottles, marked by a label on each of which was printed and painted a representation of the flag of the United States, to-wit; the trade label of the Willow Springs Brewing Company, exhibits 1, 2, 3. (Printed Record pages 17-18-19,) and after so stating the case to the jury, the trial court instructed the jury as follows:

You are instructed that if you find from the evidence, beyond a reasonable doubt the defendants did on the 28th day of December, in the year of our Lord Nineteen Hundred and Three, the said defendants, being then and there in the County of Douglas, and State of Nebraska, did then and there expose to public view, sell, expose for sale, and have in their possession for

sale, a bottle of beer, being an article of merchandise, upon which said bottle of beer was attached and placed a label upon which was printed and painted a representation of the flag of the United States of America, to advertise, call attention to, decorate, mark and distinguish the said article, namely said bottle of beer, on which the said label containing said representation of the flag of the United States of America was so placed; then and in that case you should return a verdict of guilty in manner and form as charged in the information. (Printed Record page 5).

That at the trial prior to the giving of said instruction, and before any testimony whatever was introduced, the following objections were made on behalf of plaintiffs in error, (Printed Record pages 14 and 15:)

Comes now the defendants and each of them and demur and object to the introduction of any testimony or evidence in this case whatever, for the following reasons:

The law upon which this complaint is based is in violation of the Constitution of the State of Nebraska and of the United States and particularly of Section One of Article Fourteen of the amendments to the Constitution of the United States, and is null and void.

The defendants further object to the introduction of any testimony or evidence whatever in this case for the reason that the law upon which this complaint is based infringes upon the personal liberty, guaranteed to the defendants by both the Constitution of the United States and

the Constitution of the State of Nebraska, and also deprives the defendants as citizens of the United States of the right to exercise the privilege impliedly, if not expressly, guaranteed to them by the Federal Constitution and the laws of the United States.

The defendants further object to the introduction of any testimony whatever under this complaint for the reason that the law upon which this complaint is based permits the use of the National flag for publishers, newspapers, periodicals, books, ornamental pictures and also on articles of jewelry, but forbids its use, under penalty, for advertising purposes generally, thus discriminating in favor of one class of occupations, and against all others and is therefore class legislation, and null and void.

These objections were overruled by the trial court, to which rulings each of the plaintiffs in error duly excepted. (Printed Record, page 15.)

For the same reasons as set forth in the above objections, the plaintiffs in error, and each of them, moved the court to instruct the jury to return a verdict for the plaintiffs in error, and later on, upon the same grounds, the trial court was asked to give the plaintiffs in error a new trial. (Printed Record, pages 7-8-9.)

The same Federal questions were presented to the Supreme Court of the State of Nebraska, in the petition in error for plaintiffs in error herein. (Printed Record pages 1-2.)

The Supreme Court of Nebraska, on the 19th day of October, 1905, (Printed Record page 21) affirmed

the said sentence, and judgment of the said district court, solely upon the ground that the law on which this prosecution is based is not repugnant to the Constitution of the United States, and therefore valid; that the opinion of said court was duly filed of record, (Printed Record page 21) as required by the laws of the State of Nebraska, Compiled Stat. Neb. pg. 679. Sec. 2699. From that judgment the present writ of error from this court to the Supreme Court of Nebraska is taken.

Assignment of Errors.

Now comes the said plaintiffs in error and respectfully submit that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Nebraska in the above entitled matter, there is manifest errors in this, to-wit:

1. The Court erred in holding that the provisions of Chapter 39, laws of the State of Nebraska for 1903, (Cobbey's Annotated Statutes, Sections 2375g, et seq.) entitled "An Act to prevent and punish the desecration of the flag of the United States", were not in conflict with or in violation of the provisions of the fourteenth amendment of the Constitution of the United States, for that the State of Nebraska, by and through the provisions of said Chapter 39, assumes and seeks (1) to deprive the plaintiffs in error and certain other citizens of the United States and of the State of Nebraska, of rights, privileges and immunities secured to every citizen of the United States and of the said State; (2) to deprive the plaintiffs in error and other citizens of the United States, of liberty and property without due process of law; (3) to deprive and to deny to the plain-

tiffs in error and certain other citizens and persons within the jurisdiction of the State of Nebraska, the equal protection of the law.

2. The Court erred in holding that by the provisions of said Act, the plaintiffs in error are not deprived of rights, privileges and immunities secured to other citizens of the United States and of the State of Nebraska, by the Federal Constitution and laws of the United States.

3. The Court erred in holding that by the provisions of said Act, the plaintiffs in error are not deprived of liberty and property without due process of law.

4. The Court erred in holding that the provisions of said Act do not deny to the plaintiffs in error the equal protection of the law.

5. The Court erred in holding that said Act and the authority exercised thereunder and thereby authorized to be exercised thereunder, is within the police power of the Legislature of the State of Nebraska.

6. The Court erred in holding that the provisions of said Act making it unlawful for the plaintiffs in error to use, in a respectful way, a representation of the flag of the United States in their business for advertising the same, to be within the police power of the State.

7. The Court erred in holding the provisions of said Act denying the plaintiffs in error the right to use said flag in a respectful way, in their said business for advertising purposes, not to be an abridgment of the inalinenable and statutory right of plaintiffs in error to pursue a lawful avocation in a lawful way without interference by the State.

8. The Court erred in holding that the provisions of said act do not unlawfully discriminate between those persons engaged in manufacturing and selling articles of mecrhandise, and those engaged in publishing a newspaper, periodical, book, pamphlet, certificate or stationery, or those engaged in the manufacture and sale of jewelry.

9. The Court erred in holding that the provisions of said Act do not cast special burdens upon those engaged in manufacturing and selling general articles of merchandise, from which persons engaged in publishing newspapers, periodicals and printing stationery, and manufacturing and selling jewelry, are exempt.

10. The Court erred in holding that said Act does not grant special privileges to certain citizens which it denies to the plaintiffs in error and to other citizens of the State of Nebraska.

11. The Court erred in holding that the provisions of said Act are uniform in their operation throughout the State of Nebraska upon all citizens of the State similarly situated.

12. The Court erred in holding that the provisions of said Act do not deprive the plaintiffs in error of the right to earn a livelihood in the pursuit of a lawful and harmless occupation.

13. The Court erred in holding that the United States does not have the exclusive power to regulate the use of the national flag.

14. The Court erred in holding that the use of the flag of the United States for advertising purposes in a lawful business and in a respectful way, offends the sensibilities of a large portion of our people.

15. The Court erred in holding that familiarity with the flag breeds contempt for it and that for which it stands.

16. The Court erred in holding that the use of the flag of the United States in a respectful way and in a lawful business, for advertising purposes, is an offense against the public peace.

17. The Court erred in ordering judgment to be entered affirming the judgment and sentences of the District Court in and for Douglas County, Nebraska.

18. The Court erred in ordering judgment to be entered and in entering judgment directing the District Court of Douglas County, Nebraska, to execute and inflict the sentences and judgment therein imposed upon plaintiffs in error. (Printed Record pages 28 29).

ARGUMENT.

I.

Analysis of the Statute on which the Prosecution is Founded.

By the provisions of the foregoing Act of the Legislature of Nebraska, four separate things are declared a misdemeanor and prohibited, under penalty of fine or imprisonment, or both, as follows:

First. The placing, or causing to be placed, on the United States flag any word, figure, mark, picture, design, drawing or any advertisement.

Second. Exposing, or causing to be exposed to public view, the flag, on which shall be printed or attached thereto, in any manner whatever, any of the things above specified.

Third. Exposing to public view, manufacturing,

selling, exposing for sale, giving away or having in possession, for sale or giving away, or for use for any purpose whatever, any merchandise or receptacle therefor, upon which shall be printed, painted, attached or otherwise placed thereon, a representation of the flag to advertise or distinguish the article or substance upon which it is so placed.

Fourth. To publicly mutilate, deface, defile or defy, trample upon, or cast contempt on the flag by word or act.

By express provision the publisher of a newspaper, periodicals, books or stationery, also jewelers are permitted to use a picture, cut, printing or engraving of the flag in their business, or on their merchandise.

The plaintiffs in error are not charged in the information with having done any of the things specified in divisions No. 1, 2 and 4, and there is no pretense that they have desecrated the United States flag by mutilation, or casting contempt thereon by word or act; but they are charged with having done the things prohibited under the third division. In other words, they used the flag in their business instead of carrying it at the head of a street procession, by exposing for sale packages of malt liquor, having placed thereon a label, containing a respectful picture of the flag, and that is the thing that is seriously made a crime by the legislature of this State. It is this part of the law that we contend, is a most unwarranted invasion by the Legislature of the rights and personal liberties guaranteed citizens of the United States by the Federal Constitution.

The several parts of this statute, as above specified, are separate and distinct, and a defendant may

be charged under any one, separate and apart from the others. Therefore, for the Court to determine and declare unconstitutional that part of the law under which the plaintiffs in error were convicted, it is not necessary that the entire Act must be found unconstitutional. Such was the ruling of the Supreme Court of New York on a similar statute in the case of *People, ex rel., McPike v. Van De Carr*, 91 N. Y., Sup. Ct. Rep. 20, 26, affirmed by the Appelate Court, 178 N., Y. 425, 429. The Supreme Court held as follows:

> That which is constitutional may stand, while that which is unconstitutional will be condemned. (*Pollock v. Farmers' Loan & Trust Co.*, 158 U. S., 601). *In the Virginia coupon cases* (114 U. S., 269) Judge Matthews said: 'It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional and another be declared inoperative and void, because unconstitutional; but there are cases where the parts are so distinctly separable that each can stand alone, and where the Court is able to see, and to declare that the intention of the Legislature was that the part pronounced valid should be enforcible even though the other part should fail.'

II.

The Flag is the Emblem of National Sovereignty and the property of the people of the United States, under the laws and Constitution of the United States.

Under the first, second and thirteenth assignments of error, we contend that the flag used by the plintiffs

in error in their business is not a State emblem, and has never received the attention of the State Legislature until the Act in question was passed July 9, 1903. And it will further be observed that the State of Nebraska has never by law adopted a flag of its own. The flag under consideration is, therefore, solely a creation of the Federal law, and this or no other State has a right to prescribe the use that may be made of it by citizens of the United States. Congress, as early as 1794, enacted Sections 1791 and 1792 of the Revised Statutes of the United States as follows:

> (Section 1791). The flag of the United States shall be thirteen horizontal stripes, alternate red and white; and the union of the flag shall be thirty-seven stars, white in a blue field.
>
> (Section 1792.) On the admission of a new State into the union, one star shall be added to the union of the flag; and such addition shall take effect on the Fourth day of July then next succeeding such admission. Fed. Stat. Ann. Vol. 3, p. 115.

The Constitution of the United States does not provide for, and Congress has never enacted any law regulating the use of the flag; hence to determine the inherent and inalienable rights of the people under the Constitution and laws of the United States to use the flag, reference must be had to the law as declared by the courts of the United States and the several states. It is said in the case of the *Collector v. Day*, 11 Wall., 113: 20 L. ed. 126, that—

> The general government and the states, although both exist within the same territorial limits, are separate and distinct sovereignties,

> acting separately and independently of each other within their respective spheres. The former, in its appropriate sphere, is supreme; but these states within the limits of their powers, not granted, or in the language of the Tenth Amendment, 'reserved,' are as independent of the General Government as that government, within its sphere, is independent of the states.

The Supreme Court of Illinois, in passing upon the constitutionality of a statute like the one under consideration, *Ruhstrat v. The People*, 185 Ill., 133, 145, declared:

> The flag is the flag of the United States as a sovereignty. The United States, acting through its Congress, has adopted a flag emblematic of national sovereignty. Presumably, the national flag was adopted for the use of the citizens of the United States. There is a difference between the privileges and immunities belonging to the citizens of United State as such, and those belonging to the citizens of each State as such. The privileges and immunities of citizens of the United States are those, which arise out of the nature and essential character of the national government, the provisions of its Constitution, or its laws and treaties made in pursurance thereof; and it is these rights which are placed under the protection of Congress by the Fourteenth Amendment. *People ex rel., Akin v. Loeffler*, 175 Ill., 585, 51 N. E., 785; Slaughter House cases, 16 Wall, 36; 21 L. Ed., 394. The right to use or display the flag would seem to be a privilege of a citizen of the United States, rather than the privilege of a citizen of any one of the states.

> The national government, in the exercise of its inherent power to establish a flag or emblem symbolic of national sovereignty, has passed (Secs. 1791 and 1792 of the Revised Statutes above referred to) and has thereby taken jurisdiction of the subject matter of a national flag, and has legislated upon it. Congress has passed no legislation restricting the use of the flag, or confining its use to any particular purpose. It would seem that, if it had been the intention of Congress to restrict or confine such use, some provision to that effect would have been embodied in the Act prescribing and describing the national flag.

Can it be said that by reason of the silence of the Federal Statute on the use of the flag, State legislation is thereby permitted on that subject? In the case of *Prigg v. Pennsylvania*, 16 Pet., 539, 618, 10 L. ed., 1060, quoted with approval in *Easton v. Iowa*, 188 U. S., 236, 237, 47 L. ed., 459, this court declares:

> If Congress have a constutional power to regulate a particular subject, and they do actually regulate it in a given manner and in a certain form, it cannot be that the state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject-matter.' Its silence as to what it does not do is

as expressive of what its intention is as the direct provisions made by it.

In the case of *Easton v. Iowa*, above cited, involving the validity of a state law regulating National Banks within the state of Iowa, the Supreme Court of that state said:

> The Acts of Congress provide no penalty for the fraudulent receiving of deposits, and the statute under consideration operates upon the person who commits the crime. And it is not a material question to determine whether it will be necessary to investigate the financial condition of the bank to prove that the bank was insolvent when the deposit was received. This statute is in the nature of a police regulation, having for its object the protection of the public from the fraudulent acts of bank officers. The mere fact that in violating the law of the state the defendant performed an act pertaining to his duty as an officer of the bank does not in any manner interfere with the proper discharge of any duty he owes to any power, state or Federal. Surely it was not intended by any act of Congress that officers of a national bank should be clothed with the power to cheat and defraud its patrons.

This court in the same case, after quoting the above language, said:

> We think that this view of the subject is not based on a correct conception of the Federal legislation creating and regulating national banks. That legislation has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are

concerned of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states.

The United States courts have generally held that where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the states, except in matters of local concern only, is repugnant to such freedom.

Robbins v. Shelby County Taxing Dist. (1887) 120 U. S., 493, *reversing* (1884) 13 Lea (Tenn.) 303. See also *Western Union Tel. Co. v. James*, (1896) 162 U. S., 655; *U. S. v. E. C. Knight Co.*, (1895) 156 U. S., 11; *Pittsburg, etc. Coal Co. v. Bates*, (1895) 156 U. S., 588; *In re* Rahrer, (1891) 140 U. S., 555, *reversing* (1890) 43 Fed. Rep., 556; *Leisy v. Hardin*, (1890) 135 U. S.; 110, *reversing* (1889) 78 Iowa, 286; *Philadelphia, etc. Steamship Co. v. Pennsylvania*, (1887) 122 U. S. ,336; *Walling v. Michigan*, (1886) 116 U. S., 455; *Escanaba, etc. Transp. Co. v. Chicago*, (1882) 107 U. S., 687, *affirming* (1882) 12 Fed. Rep., 777; *Welton v. Missouri*, (1875) 91 U. S., 282, *reversing* (1874) 55 Mo., 288; *Rhea v. Newport News, etc. R. Co.*, (1892) 50 Fed. Rep., 22; *Pacific Coast Steam Ship Co. v. Railroad Com'rs*, (1883) 18 Fed. Rep., 11; *The Barque Chusan*, (1843) 2 Story (U. S.) 455, 5 Fed. Cas. No. 2,717; *Southern Express Co. v. Goldberg*, (1903) 101 Va., 621.

Nothing which is a direct burden upon interstate commerce can be imposed by the state with-

out the assent of Congress, and the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free. *Brennan v. Titusville*, (1894) 153 U. S., 302.

When it is manifest that Congress intends to leave that commerce, which is subject to its jurisdiction, free and unfettered by any positive regulations, such intention would be contravened by state laws operating as regulations of commerce as much as though these had been expressly forbidden. In such cases, the existence of the power to regulate commerce in Congress has been construed to be not only paramount, but exclusive, so as to withdraw the subject as the basis of legislation altogether from the states. *Smith v. Alabama*, (1888) 124 U. S., 473.

The cases above cited, and the law there announced applies with equal force to this one.

The sovereignty of the nation rests upon every foot of soil within its limits. The flag, the emblem of that sovereignty is co-extensive with such sovereignty, and is intended to be used and displayed by the government and its people freely throughout the several states and upon the high seas without let or hinderance by any state. If the several states can at will prescribe the uses of the national emblem, which the Federal government has intentionally left free from restriction in its uses, and such uses as broad as the field of trade and commerce, then the states may impose any restriction whatever. If the merchant can be lawfully prohibited from using a cut of the flag on his goods and wares,

then he may with as much propriety be prohibited from displaying the flag itself over the door of his place of business, or in the streets, to call attention to his business; and he might further be subject to the charge of advertising in displaying the flag at his residence. Masonic and fraternal orders, tradesmen, showmen, and in fact all civic orders of every character in their parades upon the streets of our cities might be prohibited the use of the flag, under the guise of advertising, or becoming too familiar with "Old Glory"; in fact such restrictions might be imposed under the specious guise that "familiarity breeds contempt" as would banish the flag from the states altogether. In the case of *Ruhstrat v. The People*, above cited, page 147 the court says:

> If the State legislature can restrict the use of the national flag, and permit its use for one purpose, and prohibit its use for another purpose, it would have the right to prohibit its use altogether within the limits of the state.

Jurisdiction and Control of the National Flag has Always Been in the Federal Government: It has Never Been Any Place Else.

The act of the Legislature of Nebraska herein complained of concedes in express terms the sovereign right of the Federal government to make such laws and regulations with respect to the flag as it shall deem proper. That provision is as follows:

> This act shall not apply to any act permitted by the statutes of the United States of America, or by the United States Army and Navy regulations. * * * * *

The Nebraska Legislature, fearing that Congress might not have either the wisdom or patriotism to enact proper laws with respect to the flag, stands in the attitude of assuming jurisdiction to legislate on that subject for patriotic purposes. In this connection it is only necessary to suggest that if this state has a right to enact such a law, then the United States has not; the jurisdiction is either in the national or state government; it cannot rest in both; there cannot be such a thing as a divided jurisdiction. *Re Heff*, 197 U. S., 488, 506, 49 L. ed., 848.

Federal and State laws to punish counterfeiting do not vary this rule: they occupy different planes. The federal law punishes a fraudulent act against the national government; the state law punishes a cheat and a fraud of one person or citizen upon another within its limits. This distinction is pointed out by this court in the case of *Fox v. State*, 5 How., U. S., 416, cited by the Nebraska Supreme Court to sustain its decision in this case, to the effect that an act punished by the federal and state government may be one and the same offense, and therefore a law may be passed by Congress to punish a desecration of the flag, and likewise the state of Nebraska may pass a valid law to punish the same act. In such a case it is evident that the state by such a law attempts to occupy the same plane that an act of Congress would occupy, and is therefore invalid, as in such instances the jurisdiction of Congress is exclusive. In the case *Re Heff*, id., this court further says:

> It is true the same act may often be a violation of both the state and Federal law, but it is only when those laws occupy different planes. Thus, a sale of liquor may be a violation of both

the state and Federal law, in that it was made by one who had not paid the revenue tax and received from the United States, a license to sell, and also had not complied with the state law in reference to the matter of state license. But in that case the two laws occupy different planes, one that of revenue and the other that of police regulation.

The history of the United States discloses that the executive department of the government has at all times exercised jurisdiction over this emblem of national sovereignty. Wherever the flag is planted by the conquering armies of the United States, the sovereignty of the nation follows, and such act of sovereignty is exclusive of the power of any state or foreign nation. *Jones v. United States*, 137 U. S. 202, 34 L. ed., 691. The executive, the strong arm of the government, further assumes jurisdiction to resent and punish insults to the flag, whether committed by foreign foe, or any state of the union, as an insult to the nationality for which it stands. So universally has this right been assumed and exercised by the Federal government the people in their capacity as citizens of a sovereign nation demand of the United States, and not the several states, such protection. And we apprehend that in all places where the flag is displayed by the sovereign power of the nation, the executive arm of the government has power to protect the flag in time of peace, as well as in time of war, even to the killing of the person or persons who might haul it down, should it become necessary to resort to such harsh means. *Cunningham v. Neagle*, 135 U. S., 1, 34 L. ed., 55. Yet if the foregoing act of the Nebraska Legislature were to be given full force and effect, any

officer of the army of the United States who should happen to sell or issue to enlisted men from the quartermasters's department, at a military post in Nebraska a package of goods, whether manufactured in this state, or shipped in from another state, having thereon a cut of the flag of the United States, would be subject to arrest and punishment under this law: and any display that any executive officer of the United States might make of the flag, even under the direction of the President, not authorized by the laws of the United States, or the rules and regulations of the army or navy and prohibited by this act of the Nebraska Legislature, would subject him to arrest.

The flag is one of the instrumentalities of the national government, in war and commerce, and has played an important part in maintaining and consolidating the several states of the union into a nationality. No one will deny but that Congress in the exercise of its powers under article 1, section 8 of the Constitution, to regulate commerce and maintain an army and navy, had a clear constitutional right to create the flag, the emblem of the nations sovereignty.

It will further be conceded by all that it is a subject entirely national in its character, and not only admits but requires uniform laws and regulations with respect thereto. By analogy, the rule applied to national subjects relating to foreign and interstate commerce requiring uniform laws, throws some light on this subject. The Federal courts have universally held that the power of Congress is exclusive where the matter is national in its character, or admits of one uniform system or plan of regulation, and is certainly so far exclusive that no state has power to make any

law or regulation which will affect the free and unrestrained intercourse and trade between the states as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other states coming or brought within its jurisdiction. Fed. Stat. Ann. Vol. 8, pg. 388. This court in the case of *Welton v. Missouri*, 91 U. S., 280, states the law on that subject as follows:

> Where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all state authority.

The national character of the flag in the matter of trade and commerce is admirably portrayed in the case of *Ruhstrat v. the People*, 185 Ill., pg. 144, as follows:

> The flag is used, in the prosecution of commerce upon the high seas, as a symbol of nationality. The nationality of a ship is determined by the flag which it carries. A ship, navigating under the flag and pass of a foreign country, is to be considered as bearing the national character of the country under whose flag she sails. Under what is called, in international law, "the law of the flag", a ship-owner, who sends his vessel into a foreign port, gives notice by his flag to all who enter into contracts with the ship-master, that he intends the law of that flag to regulate those contracts, and that they must either submit to its operation or not contract with him or his agent at all. (1 Bouvier's Law Dic.—Rawle's Rev.—pp. 799, 800).
>
> It is a doctrine of international law that a ship

> becomes hostile so soon as she hoists the enemy's flag; and while the cargo of the ship does not necessarily take character from the flag, yet the general rule is that the goods under such flag follow the fate of the vessel. It is difficult to see why, if in the prosecution of foreign commerce or trade, the flag is used to protect a ship and cargo and designate the character, it should be a desecration of the same flag to use a likeness of it upon a label or trade-mark in the prosecution of domestic trade or business.

The importance attached by this court to the use of the national flag in connection with vessels and commerce on the high seas is disclosed in the case of *The Marianna Flora*, 11 Wheat., 1, 6 L. ed. 405. The Flora was a merchant vessel of Portugal and was mistaken for a pirate ship and fired upon by Lieut. Stockton in command of the armed schooner Alligator, a vessel belonging to the United States. This court, speaking through Justice Story refers to the flag as follows:

> And a piratical aggression by an armed vessel sailing under the regular flag of any nation may be justly submitted to the penalty of confiscation for such a gross breach of the law of nations. * * * * There is no pretense to say that he (Stockton) committed the first aggression. That, beyond all question, was on the part of the Marianna Flora, and her firing was persisted in after the Alligator had hoisted her national flag. It was then a case of open, mediated hostility, and this too without any national flag displayed by the Portugese ship, which might tend to correct the

> error, for she never hoisted her flag until the surrender. * * * He had the flag of his country to maintain, and the rights of his cruiser to vindicate.
>
> But it is argued that Lieut. Stockton was bound to have affirmed his national flag by an appropriate gun: * * * He, (commander of the Flora) not only did not hoist or affirm his flag in this first instance, but repeatedly fired on his adversary with hostile intentions, without exhibiting his own national character at all. * * * He, (Stockton) thought the aggression was piratical, and that it was an indignity to the national flag. It was a hostile act and indignity to the nation, and a trespass upon its rights and sovereignty.

The use of the flag has become so varied and manifold in trade and business, upon land and sea, by citizens of the United States, that we are led to the inquiry why permit the merchant upon the seas to advertise to the world by the use of the flag that his wares are the product of American genius and labor, or the master of a ship to advertise the same by carrying the national flag, assuring shippers he is under its protection, thereby securing trade and business, while commerce and trade upon the land and between the several states is carried on under the flag in the face of a drastic law like this. The merchant, tradesman or artisan who calls attention to his particular wares, trade or business by a respectful and patriotic use of the flag, is branded a criminal for so doing. The meddlesome injustice and unconstitutionality of such a law is so apparent that no court of last resort, save the

Nebraska Supreme Court, called upon to pass upon its constitutionality, has ever upheld it.

III.

The Act in Question is in Conflict With the Fourteenth Amendment to the Federal Constitution.

We contend that under the 1st, 2nd, 3rd, 4th, 7th, assignments of error, the Supreme Court of Nebraska erred in holding that said law is not in conflict with section one, article fourteen, of the amendments to the Constitution of the United States.

Section I, article XIV is as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any laws which shall abridge the privileges or immunites of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws.

The prohibitions of this section of the Constitution of the United States, have reference to state action exclusively. *Virginia v. Rives*, 100 U. S., 318. And these prohibitions, as embodied in the provisions of section one of the constitution referred to, have reference to actions of the political body denominated a state, by whatever instruments, or in whatever modes that action may be taken. A state acts by its legislative,

by its executive, or by its judicial authorities. It can act in no other way. The constitutional provision therefore must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever by virtue of public position under a state government, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state. Ex p. Virginia. 100 U. S., 347, *Chicago, etc., R. Co. v. Chicago*, 166 U. S., 234, *Scott v. McNeal*, 154 U. S., 45; *Missouri v. Dockery*, 191 U. S., 170; *Huntington v. New York*, 118 Fed. Rep., 686; *Nashville etc., R. Co. v. Taylor*, 86 Fed. Rep., 184. And this inhibition reaches the legislative as well as the executive and judicial departments. The legislative authority cannot usurp the power to determine what is due process of law, and on the plea of public necessity ignore the well-established safe-guards which the law of the land has heretofore recognized and enforced. *Meyers v. Shields*, 61 Fed. Rep., 726; *Ho Ah Kow v. Nunan*, 5 Sawy., 552, 12 Fed. Cas. No. 6,546. And it is for the courts alone to determine what rights are protected under the above provision of the Constitution of the United States, as well as what rights are unconstitutionally infringed upon by state legislation.

The law and authorities on this subject are so forcibly presented in the case of *Ruhstrat v. People*, above cited, that we quote at length from the opinion of the Court, pages 138 to 141 inclusive, as follows:

> The expression 'life, liberty and the pursuit of happiness', is general in its character, and in-

cludes many rights which are inherent and inalienable. Many of the rights referred to in this expression are included in the general guaranty of 'liberty'. The happiness here referred to may consist in many things or depend on many circumstances, but it unquestionably includes the right of the citizen to follow his individual preference in the choice of an occupation. (Black Const. Law, Page 404.)

'The right of every man to choose his own occupation, profession or employment, though not expressly guaranteed by the Constitution, is included in the right to the pursuit of happiness.' Ibid., 411, 'In *Powell v. Pennsylvania*, 127 U. S., 678, 32 L. Ed. 253, 8 Sup. Ct. Rep. 992, 1257, the general proposition that the enjoyment by the citizens, upon terms of equality with all others in similar circumstances, of the privliege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is a general part of his rights of liberty and property as guaranteed by the Fourteenth Amendment, was assented to by the Supreme Court of the United States as embodying a sound principle of constitutional law. In the latter case it was also held that, although the power and discretion which a State Legislature has in the matter of promoting the general welfare, and of employing means to that end, are very large, yet such power must be so exercised as not to impair the fundamental rights of life, liberty and property. In *Algeyer v. Louisiana*, 165 U. S., 578, 41 L. Ed., 832, 17 Sup. Ct. Rep., 427, it was said: 'The right to follow any of the com-

mon occupations of life is an inalienable right. It was formulated as such in the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'All men were created equal, that they are endowed by their Creator with certain inalienable rights, and that among these are life, liberty and the pursuit of happiness'. This right is a large ingredient in the civil liberty of a citizen. It was also said in this case that 'the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States'. It was also there said: 'If it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers, which, as already intimated, is a material part of the liberty of the citizen'. *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.*, 111 U. S., 746, 28 L. Ed., 585, 4 Sup. Ct. Rep., 652, In *Braceville Coal Co. v. People*, 147 Ill., 66, 22 L. R. A., 340, 35 N. E., 62, we said (page 71, 147 Ill., page 342, 22 L. R. A., and page 63, 35 N. E.): 'Liberty', as that term is used in the Constitution, means, not only freedom of the citizen from servitude and restraint, but is deemed to embrace the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose, subject only

to the restraints necessary to secure the common wellfare.' *Frorer v. People*, use of School Fund, 141 Ill., 171, 16 L. R. A., 492, 31 N. E., 395; *Com. v. Perry*, 155 Mass., 117, 14 L. R. A., 325, 28 N. E., 1126. *People v. Gillson*, 109 N. Y., 389, 17 N. E., 343; *Live Stock Dealers' & Butchers' Ass'n v. Crescent City L. S. L. & S. H. Co.*, 1 Abb. U. S. 388, Fed. Cas. No. 3, 408; Slaughter House Cases, 16 Wall., 36, 21 L. Ed., 394; *Godcharles v. Wigeman*, 113 Pa. St., 431, 6 Atl., 354; *State v. Goodwill*, 33 W. Va., 179, 6 L. R. A., 621, 10 S. E., 285.

The plaintiff in error was engaged in the wholesale and retail cigar business. This was certainly a lawful and respectable business. Under the authorities referred to and under the interpretation of the Constitution there made, plaintiff in error had not only the right to choose the business in which he was engaged as his occupation, but he had the right to pursue and carry on that business in any way and by any methods which were lawful and proper. Included in 'the right to choose one's occupation is the right to be free from unlawful intereference or control in the conduct of it.' Black Const., Law, p. 412. In these days of commercial enterprise, advertising is an important factor in business pursuits. It cannot be denied that the plaintiff in error had a right to advertise his business in any legitimate manner, so as to attract the attenion of the public. Nor can it be denied that the plaintiff in error had the right to design and make use of a trademark. The use of trademarks is as old as commerce itself. The conventional trademark is a part of what is called 'the symbolism of commerce.'

Browne, Trademarks, 2d Ed., Sections 1, 26. It is allowed to use a picture as a trademark, and a picture made up of many objects in many colors may be a trademark. (Ibid,, 258, 259.) Browne, in his work on Trademarks (265) says: "Color may be of the essence of a mark of manufacture or commerce, known as a 'trademark.' National flags are sometimes blended with other objects to catch the eye. They are admirably adapted to all purposes of heraldic display, and their rich, glowing colors appeal to feelings of patriotism and win purchasers of the merchandise to which they are affixed. * * One flag printed in green may catch the eye of the son of the Emerald Isle. * * * Another flag, with the stars on a blue field, and stripes of alternative red and white, may secure a preference for the commodity upon which it is stamped." The right of the citizen to pursue the calling which he has chosen, and to advertise his business in a legitimate way by the use of labels or trademarks, is not improperly exercised by making a picture of the national flag a part of such labels or trademarks, unless thereby the public safety, welfare or comfort is interfered with.'

The same conclusions, by a somewhat different method of reasoning, were reached in the case of People *ex. rel., McPike v. Van DeCarr*, 91 N. Y., Sup. Ct. Rep., 20. The Supreme Court of the United States has in a measure defined what rights are guaranteed under the above amendment to the Constitution of the United States in (*Barbier v. Connolly*, 113 U. S., 27) as follows:

> "Undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoilation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; *that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances*; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses.

The general objection that the act is unconstitutional as depriving citizens of the United States of the right of exercising a privilege impliedly, if not expressly granted to them by the Federal Constitution, is dismissed by the Nebraska Supreme Court with the observation that:

> The right to advertise whiskey, beer, tobacco and other articles of merchandise by the use of the national flag, is certainly not the subject of an express constitutional grant, and it can be said to be impliedly granted only in the sense that, like an infinite number of other acts, it is

> not prohibited. If the fact that an act or course of action is not prohibited by the Federal Constitution gives a citizen of the United States a right which the state is powerless to abridge or restrict, the sphere of state legislation is more circumscribed than has been generally supposed, and our criminal code is largely waste paper. A moments reflection would seem sufficient to show that the proposition is utterly unsound. (Printed record page 23.)

This opinion in effect announces the novel doctrine that the fourteenth amendment to the constitution protects no rights, privileges or immunities, of citizens of the United States, but those expressly enumerated and set forth; there being none expressly set forth, therefore these much quoted words of the constitution "No State shall make or enforce any laws which shall abridge the privileges or immunites of citizens of the United States", protect no rights, and are a mere nulity. This constitutional provision is a direct inhibition on the power of the several states of the union to pass laws abridging or unduly interfering with the rights of citizens of the United States, and the Federal government has wisely reserved the right to say what those rights are, and annul any law enacted by any state which interferes with the rights of her citizens, whenever such law transcends the well established and recognized police power of the state. In the case of *Lochner v. New York*, 198 U. S., 45, 56, this court has announced the rule that:

> It must of course be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the 14th Amend-

ment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext,—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family.

In construing the Constitution of the United States, that which is implied is as much a part of the instrument as that which is expressed. This principle, in its application to the Constitution of the United States, more than to almost any other writing, is a necessity, by reason of the inherent inability to put into words all derivative powers—a difficulty which the instrument itself recognizes by conferring on Congress the authority to pass all laws necessary and proper to carry into execution the powers expressly

granted and all other powers vested in the government or any branch of it by the Constitution. Ex. p., Yarbrough 110 U. S., 658, Legal Tender Cases, 12 Wall., (U. S.,) 535, *U. S. v. Marigold*, 9 How., (U. S.,) 568, *U. S. v. Morris*, 125, Fed. Rep., 324. In the case of *Hepburn v. Griswold*, 8 Wall., (U. S.) 613, this court announces that—

> It is generally, if not universally, conceded that the government of the United States is one of limited powers, and that no department possesses any authority not granted by the Constitution. It is not necessary, however, in order to prove the existence of a particular authority, to show a particular and express grant. The design of the Constitution was to establish a government competent to the direction and administration of the affairs of a great nation, and, at the same time, to mark, by sufficiently definite lines, the sphere of its operations. To this end it was needful only to make express grants of general powers, coupled with a further grant of such incidental and auxiliary powers as might be required for the exercise of the powers expressly granted. These powers are necessarily extensive. It has been found indeed, in the practical adminstration of the government, that a very large part, if not the largest part, of its functions have been performed in the exercise of powers thus implied.

The acts of individuals are presumed to be lawful until the contrary appears, and in this case the record is that the plaintiffs in error are lawfully engaged in the business of a retail liquor dealer and are, therefore,

entitled to the same consideration in a Court of justice as any business man or merchant; in other words, the law of this case must govern all persons alike within the limits of the State of Nebraska. That the plaintiffs in error have a perfect right, under the law, to choose this occupation, will be conceded, and having once chosen such occupation it follows as the night the day, they have "the right to be free from unlawful interference or control in the conduct of it". Black. Const. Law, p. 412.

IV.

The Police Power of the State Cannot be Consistently Invoked to Sustain Such a Law.

Again the Nebraska Supreme Court erred under assignments of error 5, 6, 14, 15, 16, 17 and 18 in holding that the act in question comes within the police power of the state. The provision of this act of the legislature as set forth in the foregoing third division, of the law, (Brief p. 10), under which the defendants are prosecuted, and on which this case must stand or fall, does not come within the test of the police power of the state as declared by the Supreme Court of Nebraska in *Smiley v. McDonald*, 42 Neb., 5 as follows:

> The Legislature cannot, uuder the guise of police regulation, arbitrarily invade private property or personal rights. The test, when such regulations are called in question, is whether they have some relation to the public health or public welfare, and whether such is, in fact, the end sought to be attained.

And later, in *C. B. & Q. R. R. Co. v. State*, 47 Neb., 549, the Court declares:

> The Legislature cannot, under the guise of police regulation, arbitrarily invade personal rights or private property. There must be some obvious and real connection between the actual provisions of such measures and their assumed purpose.

The doctrine here announced was affirmed on appeal in 170 U. S., 57.

Applying the test as herein announced, the question must be met and answered, how does a picture of the national flag on a bottle of beer, a box of cigars or any article of merchandise, effect, directly or indirectly, for better or worse, the public health or the public welfare, and was that the end to be accomplished by this law? The public health is certainly not impaired by such use of the flag; the public welfare, including the peace and good order of society, has been maintained in the United States for over a century without such a law, and when, only within the past few years, such a law, through false and mistaken ideas of patriotism, was enacted by the States of New York and Illinois, it was promptly declared unconstitutional by the Supreme and Appellate Courts, for the reason that to prohibit the respectful use of the flag for advertising purposes, like that with which the plaintiffs in error are charged does not lie within the police power of a State. The Supreme Court of New York, in the case of *People ex rel McPike v. Van De Carr*, 91 N. Y. Sup. Ct. Rep., 20, 27, declares that:

> It is elementary that to be within the police power the legislation must relate in some way to the public health, morals, safety, comfort or general welfare. It is not to be disputed that it

is for the Legislature generally to determine what laws and regulations are required to subserve either of such purposes, and that the exercise of legislative discretion in those respects is not the subject of judicial review, but, as was said in *People v. Gibson*, (109 N. Y., 389), 'a statute to be upheld as an exercise of the police power must have some relation to those ends; the rights of property may not be invaded under the guise of a police regulation * * * * when it is manifest such is not the object of the regulation.' The interdiction by the State of the use of a picture or representation of the American flag as a trademark, or upon trade labels, or in connection with an advertisement of merchandise, in no way relates to any one of the legitimate subjects to which the police power of the State extends. It is not to be assumed even that the decorous use of a representation of the flag for such purposes runs counter to a general public sentiment, or that the statute in this respect gives expression to a general public desire. The Government of the United States has not prohibited the use of the flag in connection with advertisements. Trade labels, of which a representation of the national ensign forms a part, are accepted at the patent office, as appears upon the face of one of the labels annexed to the complaint in this matter. Such trademarks and labels have been of common use. 'National flags are sometimes blended with other objects to catch the eye. They are admirably adapted to all purposes of heraldic display, and their rich

glowing colors appeal to feelings of patriotism, and win purchasers of the merchandise to which they are affixed. * * * One flag printed in green may catch the eye of a son of the Emerald Isle. * * * Another flag, with stars on a blue field and stripes of alternate red and white, may secure a preference for the commodity upon which it is stamped.' (Brown Trademarks [2d ed.] §265). There is nothing in the use of a representation of the American flag as a trademark, or in connection with a trademark or trade label that inspires the idea that the flag is degraded or belittled. On the contrary, the remark of Mr. Browne would seem to indicate the real situation namely, that their rich glowing colors appeal to feelings of patriotism.

Not relating to any legitimate exercise of police power, those provisions of the statute under consideration which make it a criminal offense to use the national standard in connection with a trademark or trade label or advertisement of merchandise, can not be regarded otherwise than as an unauthorized interference with the privilege and the liberty of the citizen; for liberty, as is well understood, includes the right to engage in any lawful pursuit not injurious to the community and subject only to the restraints necessary for the common welfare (*People v. Marx*, 99 N. Y., 386), and that includes the right to use all agencies customary and lawful in the prosecution of business; and it is not legitimate legislation to declare that one of those customary and lawful agencies shall be-

> come unlawful, unless its use in some way affects the public health, the public morals, the public peace, the public safety, the public welfare or the general comfort. Hence, we think as to this statute on the point now under consideration, it is obnoxious to the objection that it infringes upon the personal liberty of the citizen.

See also *Rushtrat v. People*, above cited page 143 to the same effect.

It is contended in this case, and sustained by the Supreme Court of Nebraska, that the act of the legislature in question is intended to foster patriotism, and it is in the interest of the State that her citizens should be patriotic, that they may all the better fight for their country and therefore such a law makes for the public welfare. A similar argument as to the health of the people was advanced in the case of *Lochner v. New York*, 198 U. S., 45, 60, involving the constitutionality of a statute of the State of New York, limiting employment of bakers to sixty hours a week, and ten hours a day. But this court overruled such contention declaring:

> It is also urged, pursuing the same line of argument, that it is to the interest of the State that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police

> power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature. Not only the hours of employes, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, least the fighting strength of the State be impaired. We mention these extreme cases because the contention is extreme. We do not believe in the soundness of the views which uphold this law. On the contrary, we think that such a law as this, although passed in the assumed exercise of the police power, and as relating to the public health, or the health of the employes named, is not within that power and is invalid.

With all due respect to the Supreme Court of Nebraska, we think the Court surely erred in holding that the familiar use of the flag on a label, or as a part of a trademark of a business man, is a desecration of the flag, or even tends to bring it into contempt or disrespect. In this view we are supported by the holding of the Illinois Supreme Court in the case of *Ruhstrat v. People*, above cited page 143 as follows:

> The use of a likeness of a flag upon a label, or as a part of a trademark of a business man in the lawful prosecution of his business, cannot be regarded otherwise than as an act which is harmless in itself. It may violate the ideas which some people have of sentiment and taste, but the propriety of an act, considered merely from the standpoint of sentiment and taste, is a

matter about which men of equal honesty and patriotism may differ."

In this contention we are further supported by the New York Supreme Court in the case of *People ex rel. McPike v. Van De Carr*, above cited page 28 as follows:

> There is nothing in the use of a representation of the American flag as a trademark, or in connectiod with a trademark, or trade label, that inspires the idea that that flag is degraded or belittled. On the contrary, the remark of Mr. Browne would seem to indicate the real situation namely, that their rich glowing colors appeal to feelings of patriotism.

The idea that the flag is disgraced by its use in trade is largely the result of a misapprehension as to the purposes for which the flag was created. War and commerce are the two subjects under the constitution which authorized Congress to create the flag. To the casual observer of sentimental tendencies, the necessity for and use of the flag begins and ends with war,—the emblem of the nation's martyred heroes. But to the statesman and the jurist the uses of the flag in time of peace are no less important, and occupy a much broader field. War is a necessary evil; trade and commerce are the life blood of the nation. It is in such commerce, foreign and interstate, that the flag is employed as a necessary instrumentality in carrying on the same. Upon all of the navigable rivers, lakes, bays, gulfs and inlets of the United States, and on the high seas of the world, the products of our factories and fields; the goods and wares of our merchants float in vessels to distant markets under the nation's flag. Is there any one so blinded by the blandishments of war who would

care to go on record as even expressing an opinion that this constant every day indiscriminate commercial use of the flag by the owners of every miserable craft brings it into contempt? If the goods and wares beneath the folds of the flag cast no discredit upon it, what is there about a cut or picture of the flag painted or printed on such goods that would make the average American citizen bow his head in shame. Surely such use of the flag offends no one, and does not come within the police power of the State to prohibit.

It is further sought to sustain the law in question in that it promotes or tends to promote the public peace, and is therefore a proper subject for police regulation by the state. If the use of the flag as charged against plaintiffs in error is an innocent, harmless use as set forth by the opinions of the courts above cited, then how can it offend against society, or provoke reasonable men to a breach of the peace. Every merchant and druggist, every liquor and cigar dealer in Nebraska, sells goods over his counter without any disturbance every day in the year, in open violation of this law, and if there was any merit or truth in the contention that such use of the flag in trade provokes breaches of the peace, the streets of our cities and towns would run red with blood. It is within the common knowledge of courts and laymen that such use of the flag appeals to patriotism as stated by Browne (Trademarks 265) and secures purchasers for the article on which it is stamped; on the contrary it never even occurs to sensible men to resent by word or act such use of the flag.

There is perhaps no emblem in the world around which so much sentiment and so many sacred recollections cluster as that of the cross, and while it is used for

advertising purposes more extensively, in the arts, trades and commerce than any other emblem, in connection with every conceivable thing, from a box of cough drops to an ambulance wagon; yet we hear no one complaining that the cross is being desecrated by such use, or that the Christian religion is thereby brought into contempt.

Again it may be said that the English people are the most patriotic people in the world; yet England has no law to prevent the use of her flag or coat of arms for advertising purposes, and when the Englishman in every commercial country on earth turns over his breakfast plate, he usually finds stamped on the bottom, the lion and the unicorn, or the colors of his country; but he is not incensed at this, or conscious of anything like a desecration of those time honored emblems by such advertisement. On the contrary he is proud that the goods and wares of his country bear the mark of her nationality, giving to them the prestige they deserve in the markets of the world. Why should the goods of American manufacture not enjoy the same advantage? Why should the nation not enjoy the advantage of the goods and wares of her commerce, bearing the symbol of her nationality? It is evident to the most casual observer that a commercial nation desiring to foster and maintain her commerce, has a deep interest in protecting her people, to the end that they shall not be deprived of whatever prestige may be derived in the markets of the world by stamping such goods, wares and merchandise with the insignia of their nationality. Instances of like character might be multiplied indefinitely, but these are sufficient to reveal the falsity of the logic by which the flag law is sought to be main-

tained, as well as the folly of the same when viewed in its practical operations.

In Law Notes, Volume 10, No. 4, page 67, there appears an article reviewing the flag laws of the several states heretofore referred to, and further declaring:

> Before discussing the validity of statutes forbiding the use of the flag for advertising purposes, it may be well to say a word as to the expediency of such use. In this connection, the idea naturally suggests itself that the statutes are useless, or, at least, unnecessary. The statutes are justifiable only if the use offends the sensibilities of a majority of the people; if it does offend their sensibilities, then the advertiser defeats his own end, by repelling instead of attracting possible buyers. * * *
> It would seem therefore, that a State statute prohibiting the use of the national flag for advertising purposes may be properly held unconstitutional on the ground that it interferes with the personal and property rights of the citizen, and promotes a mere aesthetic object, and therefore is not within the police power.

Another line of decisions illustrating the principles contended for will be found in the construction of the recent acts of the Legislatures of the several States throughout the country, prohibiting the use of trading stamps; such laws have been declared unconstitutional by the Courts of last resort. The case of *Young v. Commonwealth*, 101 Va., 859, 45 S. E. Rep., 327, was brought to test the constitutionality of the Virginia Act passed in 1898. In disposing of the question the Court reviews at length the recent cases upon the sub-

ject, and bases its opinion mainly upon the Rhode Island case of *State v. Dalton*, 22 R. I., 79, 46 Atl., Rep., 234. That Court holds that the Act under consideration, which was very similar to the Virginia Act, in order to be constitutional, must come within the police power of the Legislature. It then demonstrates that the Act does not look to or tend in any manner to concern the public safety, nor in any manner relate to or tend to promote the public morals. In this connection the court says:

> It is pertinent to observe that it is not enough to warrant the State in prohibiting a given business that is conducted by methods which do not meet with general approval. There must be something in the methods employed which renders it injurious to the public in some of the ways before mentioned nor is it enough to bring a given business within the prohibitory power of the State that it is so conducted as to seriously interfere with or even destroy the business of others.

Indulging every possible presumption in favor of the validity of such statute the Virginia Court concludes that it is in no way a valid exercise of legislative power. See also *State v. Dodge*, 76 Vt., 197, *Exparte Hutchinson*, 137 Fed. Rep., 950; *Hewin v. City of Atlanta*, 49 S. E. Rep., 765, to the same effect.

This character of legislation has been extended so far by the several states that in the case of *Lochner v. New York*, 198 U. S., 45, 63, this court took occasion to say:

> This interference on the part of the legislatures of the several states with the ordinary trades and occupations of the people seems to be on the

increase. In the Supreme Court of New York, in the case of *People v. Beattie*, appellate division, first department, decided in 1904 (93 App. Div. 383, 89 N. Y. Supp., 193), a statute regulating the trade of horseshoeing, and requiring the person practicing such trade to be examined, and to obtain a certificate from a board of examiners, and file the same with the clerk of the county wherein the person proposes to practice such trade, was held invalid, as an arbitrary interference with personal liberty and private property without due process of law. The attempt was made, unsuccessfully, to justify it as a health law.

The same kind of a statute was held invalid (Re Aubry) by the supreme court of Washington in December, 1904. 78 Pac. Rep., 900. The court held that the act deprived citizens of their liberty and property without due process of law, and denied to them the equal protection of the laws. It also held that the trade of a horseshoer is not a subject of regulation under the police power of the state, as a business concerning and directly affecting the health, welfare, or comfort of its inhabitants; and that, therefore, a law which provided for the examination and registration of horseshoers in certain cities was unconstutional, as an illegitimate exercise of the police power.

The supreme court of Illinois, in *Bessette v. People*, 193 Ill., 334, 56 L. R. A., 558, 62 N. E., 215, also held that a law of the same nature, providing for the regulation and licensing of horseshoers, was unconstitutional as an illegal inter-

ference with the liberty of the individual in adopting and pursuing such calling as he may choose subject only to the restraint necessary to secure the common welfare. See also *Godcharles v. Wigeman*, 113 Pa. St., 431, 437, 6 Atl., 354; *Low v. Rees Printing Co.*, 41 Neb., 127, 145, 24 L. R. A., 702, 43 Am. St. Rep., 670, 59 N. W., 362. In these cases the courts upheld the right of free contract and the right to purchase and sell labor upon such terms as the parties may agree to.

It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose. *Minnesota v. Barber*, 136 U. S., 313, 34 L. ed. 455, 3 Inters. Com. Rep., 185, 10 Sup. Ct. Rep., 862; *Brimmer v. Rebman*, 138 U. S., 78, 34 L. ed 862, 3 Inters. Com. Rep., 485, 11 Sup. Ct. Rep., 213. The court looks beyond the mere letter of the law in such cases. *Yick Wo. v. Hopkins*; 118 U. S., 356, 30 L. ed. 220, 6 Sup. Ct. Rep., 1064.

We find nothing in the case of *Commonwealth v. Sherman Mnfg. Co.*, 189, Mass., 76, to support the contentions of defendant in error. In that instance the Legislature enacted a law to prevent the use of the armes or the great seal of the commonwealth for advertising or commercial purposes, and the supreme court in sustaining the law, cited with seeming approval the cases of *Ruhstrat v. People*, and *People ex rel, McPike v. Van DeCarr*, above cited and distinguished those cases as follows:

> The statute under which the defendant was convicted differs essentially from those in the cases above referred to. It does not apply to articles manufactured before the act, nor does it apply to the flag of the nation.

V.

The Flag Law is Void for the Reason That It Attempts to Destroy Existing Property Rights.

Under assignments of Error 1, 2, 3 and 4, we contend that the Supreme Court of Nebraska erred in holding that the act of the Nebraska Legislature in question did not seek to destroy existing property rights, in that it did not deprive or tended to deprive the plaintiffs in error of their property without due process of law, contrary to the Constitution of the United States.

It is difficult to comprehend the extensive property rights that would be destroyed if this law is declared constitutional. Some idea of its extent can be obtained by going into the marts of trade and business. We see there almost countless trade labels, into which the national flag is woven in every conceivable shape and design, under which labels, immense business interests

have been built up, and property rights acquired, as in the case of the Stars and Stripes label. Many of these labels are found upon original packages brought into Nebraska from other States under the protection of the interstate commerce law, and in such instances the flag law is a direct burden on interstate commerce. Shall such property rights be stricken down in the face of the constitutional guaranty, "No person shall be deprived of life and liberty without due process of law," under the guise of protecting the flag from desecration? If the flag needs protection certainly the Federal Government can extend that protection better than any State; but if we are not mistaken such protection is opposed to the general policy of the government with respect to the flag, for whenever such laws have been introduced in Congress they have been as often defeated. Congress seems to adhere to the idea that the lesson of national sovereignty of this great nation can in no way be better impressed upon the people than by a universal and respectful use of the national flag; it goes hand in hand with the Declaration of Independence and the Constitution, and its use has been so general and universal during almost a century of national existance that orators and statesmen have found it a fruitful source of applause, painters have sketched its brilliant colors; authors have, in countless ways, woven it into the warp and woof of American literature; the people, ever since the adoption of the Constitution, during presidential elections, have used an emblem in likeness and similitude to the national flag, on which has been printed the portrait or name of one or more of the candidates for that high office; all forms of trade and business have been equally zealous in the use of the flag; so that so general has become its use that it is now as much a part

of our every day life as the air we breathe or the food we eat. At this late day to prohibit the use of the flag, as provided by our State Legislature, is about on a par with a law enjoining the people from making any quotation from the Declaration of Independence or the Constitution of the United States, for advertising purposes.

The Court of Appeals of New York in passing upon the constitutionality of such a law, in the case of *People ex. rel. McPike v. Van De Carr*, 178 N. Y., 425, 429, 70 N. E., page 966, declares:

> The statute, in express terms, therefore, applies as well to articles manufactured and in existence when it was lawful to manufacture them and have them in possession as to those thereafter manufactured or acquired. It attempts, therefore, to destroy existing property rights, and whether the value thereof be much or little, the Legislature is powerless to effectuate such a result. It follows that so much of the statute as precedes the provision affecting those who "shall publicly mutilate, deface, defile, or deny, trample upon, or cast contempt, either by words or act, upon any such flag, standard, color or ensign," is void.

The Nebraska Supreme Court, in the opinion in this case, holds directly contrary to the New York Court above cited, and in support of such holding says:

> When our act against taking fish with a seine went into effect, there were doubtless many seines manufactured and in existence; the same may be said of swivel guns, when the act making it unlaw-

ful to kill certain wild water fowl with such guns became a law.

Circuit Judge Ross, for the Northern District of California in *re Marshall*, 1 2 Fed. Rep., 323, holds that a county ordinance declaring that—

> "Every person, who in the county of Marin shall use any kind of a repeating shotgun, or any kind of a magazine shotgun, for the purpose of killing or destroying any kind of wild duck, geese, quail, partridge, doves, or any other birds, shall be guilty of a misdemeanor," and further prescribing a penalty for its violation, is void, as depriving the petitioner the use of such a gun, and therefore depriving him of his property, without due process of law.

So we imagine that swivel guns, seines, or any other property under like circumstances would come under this rule. However, statutes regulating the killing of game are to be distinguished from the one in question in that wild game belongs to the whole people, and courts have universally held that the legislatures of the several states may dispose of such game as may seem best, and that such laws are entirely within the police power of the state, subject only to the constitutional limitations against unjust discriminations.

The law prohibiting the use of the flag for advertising purposes is in no sense intended to regulate the sale of intoxicating liquors, but applies to all persons, trades or business, not exempt by the statute, within the state of Nebraska, and the law of the cases relating to the sale of intoxicating liquors, has no application to this case. The flag law relates to a national subject, not local, and prohibits acts in themselves innocent and

harmless; while the sale of intoxicating liquor is classed by the courts as an act dangerous to the public, and the sale thereof may be prohibited altogether, notwithstanding such law may result in a wholesale destruction of property values. This important distinction seems to have been entirely disregarded in the opinion of the court in this case, (Printed record page 26). The rule is stated in re Marshall 102, Fed. Rep., 325 above cited as follows:

> It is not denied on the part of the petitioner, and cannot be successfully denied that private property and private rights must always yield where the public safety, public health, or public morals demand the sacrifice. Thus, if a great conflagration is spreading towards one's house, and the public exigency demands it, the individual's home may be torn down or blown up, if such drastic measure be necessary to stay the fire. So may gambling and dance houses and such devices and other things as have direct relation to public morals be absolutely inhibited and prohibited. On the same principle,—that of danger to the public,—it is held that the sale of intoxicating liquor by retail may be entirely prohibited, and the value of breweries destroyed, by the laws prohibiting the manufacture of malt liquors. *Crowley v. Christensen*, 137 U. S., 86, 11 Sup. Ct. 13, 34 L. Ed., 620; *Mugler v. Kansas*, 123 U. S., 669, 8 Sup. Ct., 273, 31 L. Ed., 205. * * * "The constitutional guaranty," said the court of appeals of New York in re Jacobs, 98 N. Y., 105, "that no person shall be deprived of property without due process of law, may be violated without the physical taking

> of property for public or private use. Property may be destroyed, or its value may be annihilated. It is owned and kept for some useful purpose, and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes, without which property cannot be conceived, and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property." See also *Pumpelly v. Green Bay Co.*, 13 Wall., 177, 20 L. Ed., 557; *Wynehamer v. People*, 13 N. Y., 398; *People v. Otis*, 90 N. Y., 48; *People v. Orange Co. Road Construction Co.*, 175 N. Y., 84, 93.

In the case of *Sentell v. New Orleans etc. R. Co.*, 166 U. S., 705, 41 L. Ed, 1169, involving the constitutionality of a law of the State of Louisiana requiring dogs to be placed on the assessment rolls, and limiting any recovery by the owner to the value fixed by himself, for the purposes of taxation, this court discussing generally the police power said:

> It is true that under the 14th Amendment, no state can deprive a person of his life, liberty or property without due process of law; but in determining what is due process of law we are bound to consider the nature of the property, the necessity for its sacrifice, and the extent to which it has heretofore been regarded as within the police power. So far as property is inoffensive or harmless, it can only be condemned or destroyed by legal proceedings, with due notice to the owner; but so far as it is dangerous to the safety or

health of the community, due process of law may authorize its summary destruction.

Applying to this case the above rule as announced by this court, the State Legislature and the courts were bound to consider; (1) The property, whether much or little, invested in business enterprises, developed under trade marks, bearing a cut or picture of the flag, long prior to the enactment of this law; (2) No valid reason can be assigned, based upon the public morals, peace, safety, welfare or comfort, requiring the immediate destruction of such property values; (3) That prior to the enactment of the flag law by the Nebraska Legislature such an arbitrary exercise of the police power had not been attempted by the state, nor has it been generally recognized as within the police power of the state; (4) That the property and rights the flag law seeks to take are inoffensive and harmless, and can only be condemned or destroyed by legal proceedings with due notice to the owners.

According to this test it would seem as nearly conclusive as anything can, short of mathematical demonstration, that the ruling of the New York court above cited is a correct statement of the law of this case, and the Nebraska Supreme Court erred in holding to the contrary.

VI.

The Flag Law is Class Legislation, and, Therefore Null and Void.

It is again contended under assignments of error 1, 8, 9, 10, 11, that the Nebraska Supreme Court erred in holding that the act of the legislature of Nebraska

in question was not unduly discriminative, and therefore not class legislation. On the contrary we contend that this law directly permits the publishers of newspapers and books, the stationer and the jeweler to use the flag in their business, to place it upon their goods and wares, thereby attracting attention to them, advertising them, and by such means increasing their trade and business; but if any other merchant or business man uses the flag in his business, or as a part of a trademark, under which his business is carried on, he thereupon becomes subject to the pains and penalties of this statute. The provision to which the exception is taken, is as follows:

> This act shall not apply, * * * *
> nor shall it be construed to apply to a newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, or stationary for use in correspondence, on any of which shall be printed, painted or placed, said flag, disconnected from any advertisment.

It is declared in the case of *People ex rel, McPike v. Van DeCarr*, Id., 91 N. Y. Sup. Ct. Rep., 20, 29 that—

> The merchant and the manufacturer are made criminals for using such representation, while the book publisher, the newspaper proprietor, the jeweler and the stationer are permitted to use the symbol in their business, to put it upon their merchandise, and to make profit by its use. The situation is not saved by the introduction into the statute of the proviso that the stationer, the book publisher, the jeweler and the newspaper proprietor may use the representation

> of the flag so long as it is disconnected from any advertisement. The representation of the flag is impressed upon the goods of such persons, and they "call attention to" and advertise by it. The label and the trademark are, or may be, equally impressed upon the goods of other persons. In either case, there is no substantial difference in the use of the symbol or representation of the flag. Certain classes of men by this law are allowed to use that representation of the flag, for their own profit, on their merchandise, while others are not only debarred from doing so, but are subjected to the penalties imposed for the commission of a crime. What is that but class legislation?

While there may be a classification of subjects for legislative purposes, such classification must be reasonable, not arbitrary; must arise out of consideration of sound reasons of public policy, not mere whims—advantages extended to one citizen and denied to another.

In the case of *Lancashire Ins. Co. v. Bush*, 60 Neb., 123, it is said.

> There is nothing in the Constitution of the United States, or of this State, which forbids classification of subjects for the purpose of Legislation. *Barbier v. Connolly*, 113 U. S., 27; *Atchison, T. & S. F. R. Co. v. Mathews*, 174 U. S., 96; *State v. Farmers & Merchants Irrigation Co.*, 59 Neb., 1, The power of the Legislature to classify its subject only to the limitation that the classification must not be arbitrary. There must be some just reason for the creation of the class

to be exclusively affected by legislative action. In *State v. Farmers & Merchants Irrigation Co., supra*, page 3, it was said: 'The rule established by the authorities is that, while it is competent for the Legislature to classify, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of divers legislation with respect to the objects classified.' 'The difference which will support class legislation,' says Mr. Justice Brewer in *Gulf C. & S. F. R. Co. v. Ellis*, 165, U. S., 150, 155, 'must be such as in the nature of things furnishes a reasonable basis for separate laws and regulations.'

The Supreme Court of Illinois in the case of *Ruhstrat v. People*, above cited, page 147, also declares:

> The act is also unduly discriminating and partial in its character. It exempts from penalties imposed by the act persons who may choose to make use of the national flag or emblem for either public or private exhibitions of art. The exhibitor who engages in public or private exhibitions of art may do so, not merely for the public benefit, but for the promotion of his own interests, by thus excluding artists or exhibitors from the inhibitions of section 1, of the Act, the act thereby creates a class or classes of persons who are exempted from the penalties embraced therein. Legislation of this kind has frequently been condemned by the Courts in this country. The Legislature clearly has no power to deny to plaintiff in error the right to use the national

flag to advertise his business, or, in other words, to deny to all persons following particular occupations the right to use the national flag, and at the same time to permit artists or art exhibitors to use the same. The manner in which the act thus discriminates in favor of one class of occupations and against all others, places it in opposition to the constitutional guaranties hereinbefore referred to. *Millett v. People*, 117 Ill., 294, 57 Am. Rep., 869, 7 N. E., 631; *Ritchie v. People*, 155, Ill., 98, 29 L. R. A., 79, 40 N. E., 454.

Class legislation of the character of the act in issue enacted by the States which discriminates in favor of one person or set of persons and against another or others is forbidden by the Fourteenth Amendment. *Gulf C. & S. F. R. Co. v. Ellis*, 165 U. S., 150; *Cotting v. Kansas City S. Y. Co.*, 183 U. S., 79, 106; *Connolly v. U. S. P. Co.*, 184 U. S., 540, 559; *People v. Orange County Road Co.*, 175 N. Y., 87, 90.

The equal protection of the laws is a pledge of the protection of equal laws. *Yick Wo v. Hopkins*, 118 U. S., 356, 369; *Gibbons v. Ogden*, 9 Wheat, 1, 210; *Sinnot v. Davenport*, 22 How., 227, 243; *Butchers' Union Co. v. Crescent City Co.*, 111 U. S., 746; *M. K. & T. Co. v. Haber*, 169 U. S., 613, 626.

CONCLUSION.

We confidently submit the foregoing in the belief that this court will declare unconstitutional that part of the flag law enacted by the Nebraska Legislature July 9, 1903 under which the plaintiffs in error are prosecuted, as follows:

Or who shall expose to public view, manu-

> facture, sell, expose for sale, give away, or have in possession for sale, or to give away, or for use for any purpose, any article, or substance, being an article of merchandise, or a receptacle of merchandise, upon which shall have been printed, painted, attached, or otherwise placed, a representation of any such flag, standard, color or ensign, to advertise, call attention to, decorate, mark, or distinguish, the article or substance, on which, placed, * * * * *

for the reason that the flag is the emblem of national sovereignty of the people of the United States, under the constitution and laws of the United States, and federal control over the same is exclusive of state legislation; that so much of the law in question is in conflict with the Fourteenth Amendment to the Federal Constitution, in depriving the plaintiffs in error of a privilege impliedly granted them under the Constitution; that the police power of the state confers no authority upon the legislature of Nebraska to enact such a law; that the above provision of the law is void for the reason that it attempts to destroy existing property rights; that such provision is unconstitutional and void in that the same is unduly discriminative and class legislation; and therefore the judgment of the Supreme Court of the State of Nebraska should be reversed.

Respectfully submitted,

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